KEENER ON QUASI-CONTRACTS.[1] — I.

PROFESSOR WILLIAM A. KEENER'S Treatise on the Law of Quasi-Contracts appeared in 1893, and was deservedly welcomed. It brought to the exploding point the uneasy consciousness of many legal writers that the usual division of obligations into those of contract and those of which the violation is a tort is inadequate, if not erroneous, and it is safe to say that that venerable tradition has been brought by the learned author to a moribund condition from which recovery is impossible. Moreover, the treatise for the first time recognized and formally considered a large class of cases which have not received a sufficient treatment, in our law at least, but which deserve a separate name and a separate classification. The method of the book is excellent and almost unique in our modern juridical literature. It is the method of free and independent, yet respectful, criticism of the decisions, and of such criticism we cannot have a surfeit. With a treatise of so many striking merits it seems almost ungracious to find fault; but in spite of its ability, it seems to me chargeable with certain grave and serious errors, and this is the more regretable because its very force and original character lend to such errors a great additional vitality. My criticisms are in brief these: *first*, that the title "quasi-contracts" is unfortunate in that it suggests a false analogy; *second*, that the learned author uses it to cover an erroneous classification; *third*, that the proposition with which the learned author is mainly concerned, the proposition, to wit, that "no one shall be allowed to enrich himself unjustly at the expense of another," is, according to the interpretation of the word "unjustly," either a contradiction in terms or else a merely identical proposition from which, though true, no deduction as to the rights of litigants can possibly be drawn; *fourth*, and last, that under the name of unjust enrichment the author has been dealing for the most part with a group of remedies upon the breach of legal obligations, or upon the violation of legal rights, which are afforded by courts of law as distinguished from courts of equity,

[1] A Treatise on the Law of Quasi-Contracts. By William A. Keener, Kent Professor of Law and Dean of the Faculty of Law in Columbia College. New York: Baker, Voorhis and Company. 1893. 8vo, pp. xxxii, 470.

and are in each case alternative with the more usual remedy of damages.

The obligation of the search after truth is but meagrely met by purely destructive or negative criticism. Indeed, such criticism is available only for the purpose of pointing out internal error or self-contradiction. If other error is to be established, it must be through the application of extrinsically established principles, and the search after truth involves, therefore, an imperative obligation to search for these principles and to indicate their true applications, an obligation which this article is an attempt to meet.

I.

In his prefatory note the learned author says: "In substituting the term 'Quasi-Contract' for the term 'Contract Implied in Law' the writer has only followed the lead of Sir Frederick Pollock and Sir William Anson. While under such leadership the propriety of the substitution does not admit of question, the necessity therefor will soon become apparent to the reader;" but in the body of the book no formal explanation of the necessity is anywhere offered, and the reader can find it only by implication. There are given, however, two explanations for the choice of terms. The first is a quotation from Sir Henry Maine showing the use in Roman Law of the adjunct *quasi*[1] in such expressions as *quasi*-contract (*quasi ex contractu*) and *quasi*-delict (*quasi ex delicto*) and pointing out that it negatives the notion of identity, but calls attention to an analogy. It is to be noted that so far as the Roman use of *quasi* is concerned, it was just as applicable in the case of an analogy to torts (delicts) as in the case of an analogy to contracts, and that the learned writer had therefore a choice of terms between quasi-contract and quasi-tort, a choice which would normally be determined by the greater of the two analogies. The passage from Sir Henry Maine, however, affords no criterion for such a choice, nor does the author then indicate a reason for his preference. It is to be found in his second explanation on a later page, in which, after pointing out that the old common-law action of assumpsit, which in its essential nature was an action of contract, was by a fiction extended to what are usually called contracts implied in law, but are not contracts at all, the learned writer says: —

[1] Keener on Quasi-Contracts, 6.

"It might be asked: Why did the court extend to this class of obligations the remedies peculiar to contracts rather than the remedies peculiar to tort? The right conferred in quasi-contract, and the right, the violation of which constitutes a tort, undoubtedly possess this common characteristic, — that the obligation is imposed by operation of law, regardless of the consent of the defendant. But treating a tort as the violation of a right *in rem*, the obligations differ in an important particular; for while, to avoid committing a tort, one need only forbear, to discharge the obligation imposed by quasi-contract one must act. It is true that the obligation imposed by a contract may be simply to forbear; but the obligation most generally assumed under a contract requires one to act, and therefore contract, rather than tort, would naturally suggest an analogy. Another consideration would also suggest the analogy of contract rather than of tort: not only in most cases where a quasi-contractual obligation is imposed has the defendant not acted in violation of a right *in rem*, in consequence of which the law could impose an obligation, but in many cases he has either not acted at all, — as, for example, where an absent husband, who is ignorant of the death of his wife, is obliged to reimburse one who has defrayed the expenses attendant upon her burial, — or, if he has acted, has acted with the consent, and perhaps the co-operation, of the plaintiff; as, for example, where a defendant is obliged to refund money which he has received from the plaintiff, both parties acting under a misapprehension."[1]

The paragraph begins with a question of history: "Why *did* the court extend to this class of obligations the remedies peculiar to contracts rather than the remedies peculiar to tort?" and the answer should properly take the form of an historical account of the origin and growth of the remedies actually extended to the wrongs under discussion. It is, however, not an historical answer that the question receives, and it may be surmised that the learned author did not put the question he really had in his mind. He seems to have been actually concerned with the reasons for his own terminology rather than with matters of history. At any rate, if this is not the case, not only is no explanation of his terminology given, — except so far as the quotation from Sir Henry Maine is an explanation, and that, we have seen, leaves open a choice of terms, — but the historical question is wrongly answered.[2]

As a reason for his terminology, the explanation is unsatisfac-

[1] Page 15.

[2] See Prof. Ames's article on the History of Assumpsit, 2 HARVARD LAW REVIEW 1 and 53.

tory. It first points to a resemblance between quasi-contracts and torts which obtains in all cases of each, to wit, the fact that the obligation is imposed by law without the consent of the parties, and then discards that resemblance as a basis of analogy in favor of another which it admits to obtain in only some cases, to wit, those cases of contract in which the obligation is to act, rather than to refrain from acting. In other words, the analogy is not an analogy with the whole class of contracts at all. Just to the extent, therefore, that the term quasi-contracts points to a class, rather than to an individual resemblance, its use is fallacious. If this were an attempt at scientific classification, such an objection would be fatal. It seems to me equally fatal where, as now, there is a search for that which is a mere analogy, to be sure, but which is yet of a real, not haphazard, character, and intended to indicate a scientific rather than a whimsical classification.

In the paragraph just quoted the learned author indicates another reason why the analogy to contracts is preferred to the analogy to torts, to wit, that

"not only in most cases where a quasi-contractual obligation is imposed has the defendant not acted in violation of a right *in rem*, in consequence of which the law could impose an obligation, but in many cases he has either not acted at all . . . or, if he has acted, has acted with the consent, and perhaps the co-operation, of the plaintiff."

Again, however, he is pointing to an analogy which he expressly says obtains in most cases, and by implication says does not obtain in all. The resemblance, then, is again an individual, not a generic, resemblance, and therefore is not a sufficient basis for a generic analogy. I submit, therefore, that the choice of the name, by the author's own showing, in spite of the weighty authority of Pollock and Anson, is unfortunate.

II.

Unfortunate as is the word quasi-contract as indicating an analogy, it seems to me still more unfortunately used as the name of a class of rights and as a term of classification. The learned writer has himself indicated the true theory of classification in the matter of legal obligations in the following words: —

"It needs no argument to establish the proposition that it is not scientific to treat as one and the same thing an obligation that exists in every case because of the assent of the defendant, and an obligation that not

only does not depend in any case upon his assent, but in many cases exists notwithstanding his dissent."[1]

In other words, the learned author has objected to the usual classification, which includes so-called contracts implied in law under the name of contracts, because it neglects the origin or cause of these several obligations for a mere resemblance. The unexpressed major premise of his argument is that all rights and obligations are to be classified according to their origins or causes, — a proposition which in these days of evolutionary science will hardly be denied either in its application to biology or in its application to legal principles. The learned writer, however, has not obeyed his own canons. He classifies the following obligations as all quasi-contractual: —

"1. Upon a record.

"2. Upon a statutory, or official, or customary duty.

"3. Upon the doctrine that no one shall be allowed to enrich himself unjustly at the expense of another."[2]

The mere enumeration of these various obligations indicates a several origin for each. The first is founded upon the mandate of the court, and depends for its validity upon the right of a court to adjudicate between contending parties. The statutory duty depends upon the mandate of the legislature, which in turn depends upon the right of the community through its legislature or otherwise to prescribe positive duties to its members. The last depends by its terms upon a principle of natural justice, and not upon a mandate of court or legislature. How then can he classify them under one head and maintain a consistency with his own indicated law of classification?

Nothing appears in the subsequent discussion of the nature of the various obligations of quasi-contract to remove the basis of this objection. To consider them in their order, of the obligation founded upon a record he asserts[3] that it is quasi-contractual, for the reason that, as pointed out by Mr. Justice Field in a passage which he quotes in full,[4] it is not founded upon the assent of the parties, and is not, therefore, contractual. Now it is to be noted that the learned author has already pointed out that the obligations of which a breach is a tort are quite as independent of assent as

[1] Page 1. [2] Page 16. [3] Page 16.
[4] State of Louisiana *v.* New Orleans, 109 U. S. 285.

are quasi-contracts.[1] To prove that the obligation upon a record is independent of assent is not sufficient, therefore, to prove that it is a quasi-contract, for he must go further and show that of at least these two classes, quasi-contracts and torts, each lacking that element, it properly belongs to the former. To prove that it is *not* one is no proof that it *is* another. He has in fact committed that logical error technically known as the fallacy of undistributed middle. His syllogism may be stated thus: —

Quasi-contracts are obligations not founded upon assent;

Obligations upon a record are obligations not founded upon assent;

Therefore, obligations upon a record are quasi-contracts.

The class of obligations not founded upon assent, which is the middle term whereby he effects the logical transition from obligations of record to quasi-contracts, is not, to use the technical phrase of logic, distributed, — that is, is not wholly comprised within either of the other two. To make his syllogism sound, he must be willing to say either that quasi-contracts include all the non-consensual obligations that there are, or that obligations of record include them all, — a willingness which in view of his analysis of torts we cannot suppose to be a fact.

It is to be observed, however, that while the syllogism is incorrect, the conclusion is not by this criticism proved to be untrue, for it may actually be that obligations of record are quasi-contracts. The matter of its truth is to be considered later.

Of his second class of quasi-contracts, he gives two examples of statutory obligation,[2] and his treatment of them is precisely identical with his treatment of the obligation upon a judgment. In each he cites a passage from the opinion of a court, pointing out that the element of assent is wanting, and thence he concludes that the obligation is quasi-contractual. The objection that proof that they are *not* contracts does not prove that they *are* quasi-contracts again obtains. A breach of them, consistently with his argument, may well be a tort. His middle term is again undistributed.

Of customary obligations he instances that of a carrier,[3] founded upon the custom of the realm to receive and carry safely, and of an inn-keeper[4] to receive guests, or to keep their goods safely. He says: "That the liability in such cases arises, not from con-

[1] Page 15. [2] Pages 16, 17. [3] Page 18. [4] Page 18.

tract, but from a duty, is clear. While it is true that the liability is ordinarily described as one in tort, it is submitted that it has been so described because of the usual classification of legal rights into contracts and torts, and that since the obligation imposed upon the carrier and the inn-keeper is *to act*, the obligation is really quasi-contractual in its nature, and not in the nature of a tort." Again the syllogism is defective, for proof that the obligation is not a tort is not proof that it is a quasi-contract. It may be a true contract. His error is again that of the undistributed middle.

Of his official duties he has only this to say[1]: "Of this nature also, it is submitted, is the obligation of a sheriff to levy execution and pay the proceeds to a judgment creditor."

He adduces no argument in support of his position, which seems to be at least questionable. The obligation of the sheriff would seem very largely to depend upon his consent. Of his own free will he enters upon his office, and of his own free will he may leave it. To be sure, he cannot assume the office without assuming its duties; but they are none the less voluntarily assumed. When in pursuance of his office he levies execution, he would seem to be in a position analagous to, if not identical with, a voluntary trustee or bailee holding the proceeds for the benefit of the plaintiff. I submit that it is not at all certain that the obligation does not contain a large consensual element, and may not therefore be rightly classed as contractual.

To the obligation founded upon unjust enrichment substantially the whole treatise is devoted. In his discussion of its nature the earned author restricts himself to showing that it contains no element of assent.[2] In this he is wholly convincing; but to establish the want of assent is in nowise to establish that the obligation is quasi-contractual, because there may be many obligations not quasi-contractual, such as those of which a breach is a tort, in which that element is lacking. The old fallacy of undistributed middle is again exemplified.

The truth is that in no one of these discussions does the learned author complete a logical argument. In each of them, to make it technically correct, it is necessary to say either that all obligations not founded upon assent are quasi-contracts, in which case quasi-contracts would include torts, or else that all obligations in which

[1] Page 19. [2] Page 19.

the duty is to act are quasi-contracts, in which case quasi-contracts would include many contracts. Both of these results the learned author would be the first to deny. It would seem, however, that in each case he had in mind not one, merely, but two, criteria for determining the character of the obligation under discussion, — that is to say, he had in mind not only the criterion of the presence or absence of assent, but also the criterion of the affirmative or negative character of the obligation, — and that he contented himself with applying that one about which there seemed to him to be the most doubt, and left the reader to apply the other. So considered, his reasoning may in each case be fully stated thus: an element in the obligation of contracts is the assent of the parties; an element in the obligation a violation of which constitutes a tort is that the duty is to forbear; in this obligation under discussion neither of these elements appears; it shall, therefore, be relegated to a third class of obligations to which the name quasi-contracts shall be assigned.

This analysis I believe to be a just statement of the author's position. If it is not, I have failed to find the principle upon which he groups such varying obligations under one head. If we assume it to be his true position, it follows that a division of obligations into torts, contracts, and quasi-contracts, is an exhaustive division, that is, it includes under one or the other head all possible obligations. It is valuable also as calling attention to, and successfully combating, the common error that confuses consensual and non-consensual obligations; but it is unscientific, however, as a permanent scheme of classification, because in the residuary class it neglects the elements both of likeness and of common origin, upon one or the other of which all scientific classification is founded, and upon the second of which the learned author, as we have seen, based his objection to the usual classification. His residuary class is only a conglomerate of unrelated obligations, and is not a true class at all. It is as if the animal kingdom were divided into man, monkeys, and all other animals, — which is division, rather than classification.

Another classification, however, may be suggested as that which the learned author had in mind, as follows:

Obligations may be divided into those imposed by the will of the parties and those imposed by operation of law, and the latter may be again divided into those of which the obligation is to forbear and those of which the obligation is to act. Set forth diagrammatically, the division is like this:

Obligations = { Those imposed by the will of the parties (Contracts) } Those imposed by law = { To forbear (negative) = Obligations of which breaches are Torts. / To act (positive) = Quasi-Contracts. }

Upon this classification, it will be urged, quasi-contracts are not a mere residuary class formed by exclusion from torts and contracts; but are, on the contrary, a true scientific class founded upon a real generic likeness common to all its members, to wit, that they are imposed by law and are to act.

The learned author does not expressly make this classification and, like the other, it is to be gathered, if at all, only by implication. Neither does he say anything to show whether or not, assuming it to be his classification, it is intended to be exhaustive. If, however, it is not intended to be exhaustive, that is, if there are obligations not provided for in its scheme, it is obvious that in any given case an obligation could be brought within one of its classes only by showing affirmatively that it possessed the distinguishing marks of that class. To show negatively, for example, that a specific obligation did not fall either with torts or with contracts, to use, that is, a mere exclusionary method, is not logically sufficient, since it might fall outside of the classification altogether. Unless, therefore, this scheme contains a complete division of obligations, the fallacy of undistributed middle which lurked in all the author's discussion of special cases, such as obligations of record and statutory and other duties, re-appears in a much more fatal form than any which it has hitherto assumed. The author's use of the method of exclusion, however, is an almost conclusive proof that he conceived his divisions to be exhaustive, and therefore this proposed classification does justify his special discussions, not as he wrote them out to be sure, but in their full and complete expression.

The first division of obligations creates two classes, those imposed by the will of the parties and those imposed by operation of law. There is an ambiguity about the phrase, "imposed by law," which the learned author does not attempt to relieve. On the one hand, it may denote the sanction of the law, that is, the aid which the law grants to antecedently existing obligations. In that case, however, it is as applicable to contracts as to any

other class of obligations, and this the author expressly recognizes, when he says: "A true contract . . . exists as an obligation because the contracting party has *willed*, in circumstances to which the law attaches the sanction of an obligation, that he shall be bound."[1] All legal obligations, contractual or otherwise, possess that sanction or else they cease to be legal. In this view, the phrase "imposed by law," being applicable to all obligations of judicial cognizance, ceases to be a valid mark of distinction among any of them, and we are driven to find some other characteristic wherewith to account for the learned author's division. The only distinction which he even indirectly suggests is the element of mutual assent, present in contractual obligations, but absent in all others. If, therefore, I have rightly grasped the author's meaning in the phrase "imposed by law," it would seem that it is inadequately used in this supposed classification and that the terms consensual and non-consensual are the more exact expression of his antithesis. On the other hand, the law may be considered as a source of legal obligations in contradistinction to the will of the parties, and that may be the meaning of the words, "imposed by law." This notion of the law as itself a source of obligation is not very definite and the author certainly does not expressly set it forth. It seems, however, to be hinted at in such a phrase as this "the obligation is imposed by operation of law, regardless of the consent of the defendant;"[2] but since the author has used it without explanation, except as antithetically opposed to the notion that consent is a source of obligation, and has evidently regarded the two as exhaustively dividing obligations in general, I am forced to believe that by obligations imposed by law no more is meant than obligations not resting upon consent. If that be so, then again an antithesis that would more clearly conform to his thought would be an antithesis between consensual and non-consensual obligations.

It may be insisted, however, that the law is as valid a source of obligation as is the will of the parties and, therefore, equally valid as a criterion of classification, and that in spite of any evidence to the contrary, the phrase "imposed by law" may thus have a positive content of meaning and not the merely negative or exclusionary content which I have indicated. The objection is certainly valid

[1] Page 4. See also Prof. Langdell's article on Equity Jurisdiction, 1 HARVARD LAW REVIEW, at p. 56, and n. 1.

[2] Page 15.

and a consideration of this suggested meaning is therefore necessary. It brings us back, however, to the indefiniteness of the thought itself. How can the law be a *source* of obligation? It is conceivable of course that the law may impose obligations which have no reason outside of the law itself. Such an obligation would be a legal obligation, having its origin in the law, and in the law alone, and the law might then rightly be called the source of the obligation. Certainly there is no other source. But having no reason, such an obligation would be incapable of explanation and would have no more validity than the power of the government behind it. It would be in fact an arbitrary or tyrannical obligation, and such obligations are not the subject-matter of jurisprudence. This meaning of the phrase "imposed by law" in a science of jurisprudence therefore defeats itself and may be neglected. If, on the other hand, the law acts in each case with a reason, the relation of law to that reason differs in no respect from the relation of law to the will of the parties in the case of legal contractual obligations. The will of the parties is, with those obligations, nothing but the reason of the law. In other words, the reason must exist antecedently to the law and the law is but the sanction of society added to the inherent force of the reason. The result is then that the notion of the law as a source of obligation means nothing more than a sanction applicable to all obligations, consensual and non-consensual alike. By obligations imposed by law, therefore, the learned author can intend only one of two things, either obligations carrying with them a legal sanction, that is, all legal obligations whatsoever, or else, as we have heretofore seen, a class of obligations marked only by the absence of the element of consent.

Now, whichever of these two we take to be the meaning of the phrase "imposed by law," we find the opposition between the two classes which the author has created to rest fundamentally on the presence or absence of mutual assent, with the result that the class in which the assent is absent, the class of obligations imposed by law, that is to say, resolves itself in essence into a mere residuary class, formed on a principle of exclusion and containing within itself no element of generic likeness. But such a class as we have seen is not a true class and is not valuable in scientific classification.

The subdivision of obligations imposed by law into obligations to act and obligations to forbear is logical enough because it is exhaustive, action and forbearance being antithetical and per-

mitting no third supposition; but it falls to the ground with the failure of the prior and main division. There is no scientific advantage to be attained in accurately dividing a mere heterogeneous mass. The futility of such an attempt is precisely exemplified in the following example, which I believe to be an accurate analogue to the suggested scheme of the learned author: Animals may be divided into those which are human and all other animals, and the latter may be again divided into those that are white and those that are colored. In this illustration it will be readily seen that if the class "all other animals" were a true genus, as, for example, the genus bear, white might readily become the true and scientifically valuable mark of a species, as, for example, the white or polar bear, but that as it is, by reason of the insufficiency of the prior division, it has lost any such possible value. So it is with the distinction between positive and negative obligations. It is a distinction which is applied to a class containing, for aught that appears to the contrary, many subdivisions and which may therefore override the lines of subdivision. It may therefore on the one hand group many obligations which on closer inspection would be seen to be quite different and separately classifiable, and on the other may divide obligations which should not be divided.

Assuming, however, that the subdivision into obligations to forbear and obligations to act is possible of interpretation as a division along lines of inherent likeness, I yet incline strongly to the opinion that the class of obligations to act is after all in the learned author's essential meaning not to be so interpreted, but is on the contrary, merely exclusionary. It is to be remembered that he was already furnished with the historical conception of torts as a class by themselves in which the duty was to forbear, and that conception was apparently his starting point. A mere exclusionary process would therefore give him his second class of obligations, obligations to act. Moreover an examination of the obligations which he includes within its limits discloses such a diversity of character as would inevitably suggest further classification, if his object had been to find elements of likeness. Finally his constant use of the process of exclusion as a method of argument lends probative force to the idea that it was his method of classification as well. If this be the correct interpretation of the learned author's theory, as I believe it is, it follows that this suggested method of classification does not differ in any material aspect from that which I had myself deduced from his arguments respecting individual obligations,

because in the last analysis both reduce themselves to the same method, the method of exclusion.

Whether these two theories as to the learned author's classification, however, are or are not substantially identical, I submit not only that the arguments formally adduced by him in support of it are technically insufficient, but also that either theory is substantially unsound and unscientific.

III.

The main purpose of the treatise under review is to explain as a principle of jurisprudence the doctrine of unjust enrichment and thereafter to examine it in its various applications. The learned author does not attempt to justify it or to explain its origin. He assumes without argument that it is self-evidently true and also that it is valid as a juridical principle. This is unfortunate, for weighty reasons may be adduced to prove that neither of these propositions is true.

The learned writer thus states this principle: "No one shall be allowed to enrich himself unjustly at the expense of another."[1] Inasmuch as he is dealing with a proposition of law (using that word in its largest sense as including equity and meaning the whole power of the Courts to remedy wrongs), it is in no degree a perversion of his meaning to mark the fact more clearly by inserting the words "by law" after the word "allowed," so that the proposition will read: *No one shall be allowed by law to enrich himself unjustly at the expense of another.* Indeed this addition is necessary to redeem the proposition from the charge of being ethical merely and not juridical.

It is a valid criticism of the learned author's phraseology that it does not, even as amended, fully convey his meaning. He has stated[1] that the obligation of which he treats is affirmative, not negative, requiring an active performance, not a passive forbearance, and it is by this mark that he distinguishes it from torts. His proposition on the other hand, the form into which he casts his juridical principle, is a mere prohibition, to which conformity is, as he says of torts, only forbearance. This point seems to have escaped him, for he does not define the active duty, leaving it, on the contrary, to be inferred by his readers.

Taking the proposition as it stands, however, it is open to a still more fundamental objection. If it be true that no one shall be

[1] Page 16.

allowed to enrich himself unjustly at the expense of another, it is also true that no acts whereby one does so unjustly enrich himself at the expense of another are allowed by law, or to state the proposition conversely, all such acts are by law forbidden. The proposition may therefore be stated in this form: *Acts whereby one unjustly enriches himself at the expense of another are forbidden by law.* Now that which the law forbids is illegal. The very definition of illegality is the quality or condition of being in contravention of law. Our proposition may therefore undergo another transformation and, still with no change of sense, become: *Acts whereby one unjustly enriches himself at the expense of another are illegal.* In this proposition the verb "enriches" states the doing of an act while the adverb "unjustly" qualifies it by stating the mode of the doing. To state the same act by a noun and to qualify it by the corresponding adjective is a common substitution and involves no change of meaning. To make such a substitution in the present case will give the proposition this form: *Acts of unjust enrichment of one at the expense of another are illegal.* But acts *of* unjust enrichment are acts *resulting in* unjust enrichment and if the act is illegal, so is the result. Indeed it is almost tautological to say "acts of unjust enrichment," for an unjust enrichment is itself an act. The proposition may then be reduced to its lowest terms as follows: *The unjust enrichment of one at the expense of another is illegal.* It is extremely unlikely that the exact identity of this proposition with the proposition as enunciated by the author would be disputed, for it is apparent on the face of the matter; but I have been thus particular in setting out the various transpositions in order to avoid the possibility of error. The proposition as it now stands is in the normal form of a juridical principle, in which the subject should define a general class of acts and the predicate should define their juridical quality. Now it is to be noted that in the present form, as well as in all the transmutations, the word "unjust" is of the essence. It is not true that a man may not enrich himself at another's expense, because that he may, legally and rightfully and intentionally. Thus it requires no authority to prove that an innocent purchaser for value may enforce against the maker a promissory note which after the purchase he learns to have been procured by fraud and imposition. That is enriching himself at the expense of the maker, but the enrichment is neither unlawful nor unjust. It is necessary, therefore, to consider the meaning of this word unjust.

It is generally conceded, and it is undoubtedly true, that the forum of the law is not of equal jurisdiction with the forum of the conscience, and that some acts may be ethically unjust which are yet permissible in law. Unjust acts may be therefore either unjust and legal or unjust and illegal. This difference may be indicated in our proposition, which will then take on either of these two forms: —

1. The unjust and *legal* enrichment of one at the expense of another is illegal.

2. The unjust and *illegal* enrichment of one at the expense of another is illegal.

In the first of these two propositions, if it be laid down as a principle of jurisprudence, the law is made to characterize the act according to its standards in one way in the subject, that is, to declare it legal, and to characterize the same act by the same standards in a contradictory way in the predicate, that is, to declare it illegal. The word "unjust" does not in any way relieve the conflict between subject and predicate, and may therefore be neglected. The first proposition then reduces itself to a contradiction in terms.

The second proposition is obviously true. An illegal enrichment is of course illegal. Such a proposition, however, subserves no useful purpose. It is like the equation in mathematics, A = A, from which no deduction can be drawn, being in truth only a seeming equation. There are not in fact two objects which are equated, because the apparent equation means only that the thing equals itself, that is, there is only one object of contemplation. Such a proposition is entitled in logic an identical proposition and is recognized as true, but also as logically valueless. It is a truism, rather than a truth.

The proposition, therefore, with which the learned author began, No one shall be allowed to enrich himself unjustly at the expense of another, reduces itself according to the interpretation of the word "unjustly," either to a contradiction in terms or else to a mere identical proposition, and in either case cannot ever be a true principle of jurisprudence. The first form of the proposition, being a contradiction in terms, self-evidently cannot become such a principle. The second is equally valueless, but for the different reason that no conclusion can ever be drawn from an identical proposition. This can be demonstrated in the present instance if an attempt is made to use the proposition as a guiding principle or reason of deciding any particular concrete case.

In any controversy in which the proposition can be referred to as a guide to its decision, one of the parties to it alleges the existence of a state of facts from which he draws the conclusion that the other or one of the others has been unjustly enriched at his expense, and he claims appropriate relief. The opposing party denies the allegations or disputes the conclusion to be drawn from them. If the decision of the controversy be in favor of the alleging party, it is clearly no answer to the defeated party to say that he is defeated *because* he has been unjustly enriched at the other's expense. So to answer would import into the reason the very matter in dispute, which is a clear begging of the question. Similarly, if the decision be against the alleging party, it is no answer to him to say that he is defeated *because* the other has not been unjustly enriched at his expense. The matter in dispute is again drawn into the reason and there is another begging of the question.

In either case the proposition is not a reason at all. That is the very vice of the *petitio principii*, which, more or less plausibly, purports to give a reason, but fails. It is a mere repetition of a prior assertion and is but one form of an identical proposition. To use the proposition therefore as a reason is only to say, The plaintiff ought to recover, because he ought to recover, or to say, The defendant ought to prevail because he ought to prevail.

There is only one other way in which the proposition can, even in appearance, be given as a reason or put to practical use and that is by ascertaining the reason why the acts in question are just or unjust and then ascertaining the obligation of the parties by the standard of justice so obtained. In that event, however, the real reason of deciding is, not the proposition, but this extrinsic standard. This is true, even if the proposition be used as a sort of middle term, in actually rendering the reason. Thus to say to the defeated party, when the decision of the controversy is against him, that he is unjustly enriched at the other's expense because (to take an example) he has obtained money from the other by a false statement of fact, is merely to import an unnecessary term. It is in effect to say, you ought to be defeated because you ought to be defeated because you obtained money by false pretences. Resorting again to the simile of an equation, it is like saying, $A = A = B$. The middle term in both cases is unnecessary and should be neglected as not actually used.

If the argument has so far proceeded correctly, it follows that the doctrine of unjust enrichment, even in its most valid statement, is

incapable of a real application as a principle of jurisprudence, and that if the attempt is made so to use it, the attempt results either in begging the question or else in a more or less conscious resort to some other and extrinsic principle. An examination of the treatise under the review is an empirical proof of the justness of this conclusion. In each discussion one or the other of these two errors is exemplified. Thus the former is illustrated in the following passage[1]: —

"In Farmer *v.* Arundel[2] the plaintiff sought to recover money which he had paid the defendant for the support of a pauper, supposing that the defendant, who had supported the pauper, had a right to call upon him for reimbursement. It was held that regardless of the defendant's right to demand payment, there could be no recovery, since it was not against conscience for the defendant to retain the money so paid. De Grey, C. J., said: — 'When money is paid by one man to another on a mistake either of fact or of law, or by deceit, this action will certainly lie. But the proposition is not universal that whenever a man pays money which he is not bound to pay he may by this action recover it back. Money due in point of honor or conscience, though a man is not compellable to pay it, yet if paid, shall not be recovered back, as a *bona fide* debt, which is barred by the statute of limitations. . . .

"'Admitting, therefore, that the money could not have been demanded by the defendant (which it is not now necessary to decide), yet I am of the opinion that it is an honest debt, and that the plaintiff having once paid it shall not by this action, which is considered an equitable action, recover it back again.'"

If this passage is analyzed, it will appear that the only reason stated by the learned author is that it was "not against conscience" for the defendant to keep the money, and that the only reason stated by the Chief Justice is that "it was an honest debt." The sum and substance of these reasons is only this, that the plaintiff ought not to recover. Was not this the very matter in issue, and did the plaintiff receive a sufficient answer, or any answer at all, to his arguments to the contrary?

The following passage illustrates the reference to extrinsic principles[3]: —

"This suggestion [not now material] presents for consideration the theory upon which a plaintiff who has a right to sue for a breach of contract is allowed to sue in *indebitatus assumpsit*. If this right is to be

[1] Page 43. [2] 2 Wm. Bl. 824. [3] Page 299. — The italics are mine.

given a plaintiff, it would seem to be for the reason that the defendant should not be allowed to blow hot and cold, and to profit by a contract the burdens of which he refuses to perform. The obligation imposed by law in such a case then should be that the defendant make restitution in value to the plaintiff of that which he received. *On no other theory can the count for money had and received which does not sound in damages be maintained.*"

This is an excellent statement of the obligation of restitution upon a breach of contract. The obligation is explained, however, not by the doctrine of unjust enrichment, but rather by the proposition that the defendant cannot occupy two inconsistent positions at one and the same time, that is, that having by his refusal to perform denied his obligation, and the plaintiff having accepted the situation by demanding back the consideration paid, by the act of both parties the contract is rescinded, and the defendant cannot alone, without the plaintiff's consent, reinstate it.

I desire to redeem myself from the charge of disputing about unessentials. It is a pity that logical accuracy should ever be deemed a matter of small moment; but beyond a doubt it is often so regarded. Apart from any question of logical accuracy, however, a decision which begs the question is a decision without a reason, which, *even if right in the particular case*, may become through its force as a precedent the source of grave error. Nobody can count the evil results of our right decisions wrongly reasoned. The chance, however, of achieving truth by means of error is remote, and the requirements of practical justice demand that a doctrine of such wide application as that under discussion, should be rigorously and severely tested.

IV.

We have seen, if the argument is so far valid, that the doctrine of unjust enrichment is either a contradiction in terms or an identical proposition; and that in either case, it is inapplicable to the decision of a concrete controversy as a principle of jurisprudence. We have further found that if the attempt to apply it is actually made, the attempt results either in a begging of the question or in a reference to some other and logically anterior principle which thereby becomes the real reason for deciding, while the doctrine itself is to be rejected as a redundant link in the chain of reasoning. From this dilemma the learned author never quite escapes, as indeed he could not, so long as he retained his original assump-

tion of the validity of his proposition. The gravity of this error should not be underestimated; but at the same time it is but just to the author to point out that in the majority of his discussions, and even in the wording of his general principle, he has referred, implicitly or explicitly, to a logically prior principle, and that in a criticism of his work upon the merits, full account of that principle should be taken. Now the sound thesis and the one upon which Professor Keener really built I conceive to be this: that there is a remedy, differing from, but alternative with, damages, granted by courts of law upon legal wrongs; that the process of reasoning by which the right to this remedy is established varies with the original right that is violated; but that, the remedy being established in the case of each right, it can be shown that it is quantitatively identical in all cases, and can, therefore, be conveniently called by a single name. For this remedy restitution seems to be the most apt designation. Justice to the learned author, as we have seen, requires that in addition to the formal criticisms which have been urged against his treatise, there should be a further discussion of this thesis, and in the remaining pages of this article, therefore, I shall venture to offer a theory of restitution and then to criticise the author's theory by that as a standard.

What, then, is the remedy of restitution?

Everett V. Abbot.

NEW YORK, 1896.

(*To be continued.*)